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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

INGRID OLSEN, as Successor in Interest,

Plaintiff and Appellant,

v.

NORTH AMERICAN COMPANY FOR
LIFE AND HEALTH INSURANCE,

Defendant and Appellant.

E041640

(Super.Ct.No. INC037361)

OPINION

INGRID OLSEN, as Successor in Interest,

Plaintiff and Appellant,

v.

NORTH AMERICAN COMPANY FOR
LIFE AND HEALTH INSURANCE,

Defendant and Respondent.

E045194

(Super.Ct.No. INC037361)

OPINION

APPEAL from the Superior Court of Riverside County. Douglas P. Miller and Harold W. Hopp, Judges. Reversed as to case No. E041640. Dismissed as to case No. E045194.

Daniels, Fine, Israel, Schonbuch & Lebovits, Paul Fine, Scott Brooks; The Law Offices of Ian Herzog, Evan D. Marshall, Ian Herzog and Justin Ehrlich for Plaintiff and Appellant.

Reed Smith, Margaret M. Grignon, James C. Martin, Robert D. Phillips, Jr., Kevin W. Wheelwright and Zareh Jaltorossian for Defendant and Appellant and for Defendant and Respondent.

Ernst Hammermueller (hereafter plaintiff) petitioned for rehearing after we reversed the multimillion dollar judgment entered in his favor on his complaint for damages based on fraud, negligent misrepresentation, and financial abuse of an elder filed against several defendants, including North American Company for Life and Health and Insurance (hereafter NAC).¹ In his rehearing petition, plaintiff alleged that NAC had not raised the dispositive issue in the trial court and therefore could not raise it on appeal. That issue is whether plaintiff may recover noneconomic damages on any of the three theories of recovery he pursued at trial because the jury instructions and special verdict

¹ Plaintiff died during the pendency of this appeal. Although we denied a motion to substitute plaintiff's daughter, Ingrid Olsen, as his successor in this case because that motion did not comport with Code of Civil Procedure section 377.32, we hereby make that substitution because she is plaintiff's only heir and therefore the proper party to succeed to his interest in this matter.

did not require the jury to make a finding that plaintiff had suffered economic injury as a result of defendants' conduct. We granted plaintiff's petition for rehearing and now address plaintiff's claim that NAC was required to object to the jury instructions and special verdict form in the trial court to preserve the issue for review on appeal.

In our original opinion we agreed with NAC's claim, that because plaintiff did not present evidence to show that he suffered actual injury or loss, he may not recover compensatory damages for noneconomic injury, i.e., emotional distress, under any of the three theories of liability he pursued at trial. Our resolution of that issue rendered moot the remaining issues NAC raised on appeal and also rendered plaintiff's cross-appeal moot. In addressing the issue on rehearing, we again conclude that the judgment must be reversed.

FACT SUMMARY

The pertinent facts are undisputed. In May 2002, plaintiff, who was 82 years old, purchased \$350,000 of NAC Market Choice III deferred annuities through Frank Manfred. The annuities matured at the end of 15 years and included significant penalties for early withdrawal.² At the time of the purchase, Manfred was not an authorized NAC agent.³ NAC recruits its agents through Roster Financial (sometimes also referred to as

² The fee for early withdrawal or surrender of the annuities was 22 percent for the first five years, decreasing two percent each year over the next 10 years. After the first year, the annuitant could make one withdrawal each year of up to 10 percent of the accumulation value, i.e., initial premium and accrued interest, without paying a penalty.

³ NAC sells its annuities through independent life insurance agents, who must be licensed in the state where the sale occurs.

Roster), a national marketing organization (NMO) that specializes in recruiting agents. Manfred became an affiliate of Roster in late 2001. Plaintiff met Manfred in April 2002, at a seminar Manfred presented at the retirement community in Oceanside where plaintiff and his wife lived. After several meetings with Manfred, plaintiff purchased two deferred annuities issued by another company, American Equity, each in the amount of \$100,000. On May 14, 2002, plaintiff purchased a third American Equity deferred annuity in the amount of \$50,000, and also applied to purchase \$350,000 in NAC Market Choice III annuities. Manfred submitted his application to become an NAC agent through Roster Financial, and at the same time, submitted directly to NAC plaintiff's applications to purchase the Market Choice III deferred annuities, accompanied by plaintiff's check for \$350,000. In a handwritten note, Manfred instructed NAC to use the money to purchase three annuities, one in the amount of \$50,000 and two in the amount of \$100,000.

NAC's Market Choice III annuity pays a commission of 17.5 percent, the highest commission offered by NAC on its products. The commission is shared by the agent and the NMO, in this case Roster. However, when the purchaser is over 81 years of age NAC reduces the agent's commission by 25 percent. NAC initially rejected Manfred's application to become an agent because his credit report revealed he had debts of nearly \$900,000, which included tax liens, unpaid child support, and debts to other insurers. Under NAC's appointment standards for agents, an applicant could have no more than \$10,000 in debt, none of which can be owed to another insurer. After Roster interceded

on his behalf, NAC agreed to appoint Manfred but only for the transaction with plaintiff, and with the understanding that NAC would pay the commission to Roster so that Roster would be responsible for repayment if the transaction with plaintiff fell through.

Although NAC had requested a criminal background check on Manfred, it appointed him an agent and issued the annuities to plaintiff before it received the results of that inquiry.

In any event, that search did not reveal any criminal history because NAC apparently had not requested that it include aliases Manfred had used. If a search under aliases had been conducted, it would have revealed that Manfred had recently been indicted for federal tax evasion and mail fraud.

Plaintiff purchased a total of \$600,000 in deferred annuities through Manfred. The money had been in an account plaintiff and his wife maintained with Charles Schwab.⁴ Plaintiff attended Manfred's investment seminar because his Schwab investment account advisor had recently passed away, and plaintiff was interested in finding another investment that might pay more than the Schwab account. Manfred met with plaintiff several times, and under circumstances that led plaintiff to believe that he and Manfred were friends. In the course of those meetings, Manfred advised plaintiff not only to purchase the deferred annuities but also to establish a living trust, which Manfred helped plaintiff set up for a fee of about \$5,800.

⁴ The money represented the proceeds from the sale of real property that plaintiff's wife had inherited.

During this same time, plaintiff had been caring for his wife, Irmgard, who suffered from Alzheimer's disease. Plaintiff was having difficulty providing the necessary care, and decided, at the urging of the couple's daughter, to sell their home in Oceanside and move to a retirement community closer to where their daughter lived. Plaintiff and his wife moved to an apartment in an assisted living community in Palm Desert in July 2002 before escrow closed on the sale of their Oceanside home. Irmgard's health immediately deteriorated and as a result she was moved to a facility that provided more intensive care while plaintiff continued to live in assisted living.

Because he was under stress as a result of his wife's illness, and because he too apparently was suffering from the onset of dementia, plaintiff believed, after he purchased the annuities, that he did not have any available cash and that he could not pay his monthly living expenses.⁵ Plaintiff had forgotten that he had approximately \$80,000 in a savings account at Downey Savings. As a result of distress over his financial situation, and because he believed that he did not have any money, plaintiff made two withdrawals from the American Equity annuities and paid early withdrawal penalties. When his daughter became aware of the situation and asked plaintiff what had happened to his money, plaintiff could not recall. Eventually, plaintiff's daughter discovered the annuity purchases. Plaintiff's son-in-law contacted NAC to demand return of plaintiff's money. In the interim, Irmgard passed away in September 2002.

⁵ The deferred annuities plaintiff purchased through Manfred represented more than 70 percent of plaintiff's wealth, and an even greater percent of his liquid assets.

Plaintiff's financial stress eased in December 2002, when escrow closed and he received the proceeds from the sale of his Oceanside home. In December 2002, plaintiff's son-in-law wrote a letter to NAC at plaintiff's direction demanding repayment of the money plaintiff had invested in the NAC deferred annuities. Among other things, plaintiff said in that letter that he did not know what an annuity was and had relied on Manfred's representation that it would provide him and his wife with sufficient monthly income on which to live. Manfred had not explained the penalties plaintiff would have to pay for withdrawing his money, and did not tell plaintiff that the annuities would not pay monthly income. Plaintiff also explained that he and his wife were born in Hungary and that he does not understand English "as well as he should." Plaintiff claimed that he only had \$5,000 in the bank, an assertion which should have put NAC on notice that plaintiff's annuity purchase involved more than 30 percent of his liquid assets. NAC investigated plaintiff's complaint by asking Manfred to respond to plaintiff's claims. After receiving Manfred's response, which effectively stated that everything had been above-board and fully explained to plaintiff, NAC denied plaintiff's request to return his money. In denying that request, NAC relied in part on Manfred's response, and in part on the fact that plaintiff had signed all the disclosure documents in which he acknowledged that the NAC annuities were appropriate for his investment needs.

A year later, in December 2003, and after plaintiff filed his lawsuit, NAC learned that at the time he sold the annuities to plaintiff, Manfred had been the subject of a criminal investigation. NAC notified plaintiff by letter that it would not have contracted

with Manfred had it known about the criminal investigation, and NAC returned plaintiff's annuity premiums (\$350,000), with the accrued interest.

DISCUSSION

As previously noted, the potentially dispositive issue in this appeal is NAC's contention that the judgment must be reversed because emotional distress damages are recoverable only when the plaintiff has suffered some actual physical injury or financial loss, and plaintiff did not present evidence at trial to show that he suffered either in this case. In fact, neither plaintiff nor NAC requested an instruction on the need to prove actual loss or economic injury and as a result the trial court only instructed the jury on damages based on compensation for "[p]ast and future mental suffering, loss of enjoyment of life, inconvenience, grief, anxiety, humiliation, and emotional distress." Consistent with that instruction, the special verdict form only asked the jury to specify the total amount of *noneconomic* damage plaintiff suffered.

1.

FRAUD AND NEGLIGENT MISREPRESENTATION THEORIES

We originally framed this issue as a failure of proof on the part of plaintiff to establish the essential elements of fraud and negligent misrepresentation, which are two of the three theories of recovery he relied on at trial. As we pointed out in our original opinion, in order to recover for fraud and negligent misrepresentation, a plaintiff must prove actual monetary loss. (Civ. Code, §§ 1709 & 1710; *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239-1240; *Molko v. Holy Spirit Assn.* (1988) 46

Cal.3d 1092, 1108; *Gagne v. Bertran* (1954) 43 Cal.2d 481, 487-488; *Gonsalves v. Hodgson* (1951) 38 Cal.2d 91, 100-101.) Plaintiff did not present evidence at trial to show he suffered actual monetary loss as a result of NAC's alleged fraud or negligent misrepresentations. Plaintiff's evidence was all directed at recovering damages for the mental suffering and emotional distress he experienced as a result of NAC's action or the action of its agent. Emotional distress resulting from fraud and negligent misrepresentation is not compensable unless it is accompanied by actual loss or economic injury because, as previously noted, monetary loss is an essential element of causes of action for fraud and negligent misrepresentation. As a result we originally held that neither the fraud nor the negligent misrepresentation theories support plaintiff's recovery of damages, either compensatory or punitive.

Plaintiff argues on rehearing, and we agree, that the issue is not one of failure of proof because the jury made the factual findings required under the law given to them in the jury instructions and special verdict form. The issue, correctly framed, is whether the jury instructions and special verdict form are correct statements of law, and if not, who bears the responsibility for the error. (See *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535 (*Null*) ["where a party to a civil lawsuit claims a jury verdict is not supported by the evidence, but asserts no error in the jury instructions, the adequacy of the evidence must be measured against the instructions given the jury"].)

Plaintiff contends that NAC bears the burden to insure that the instructions given are correct. To support that claim plaintiff relies on *Agarwal v. Johnson* (1979) 25 Cal.3d

932 (*Agarwal*) for the principle that where the pertinent jury instructions are correct statements of law, and their only deficiency is that they might have been too general or incomplete, the complaining party must request further instruction or explication in order to preserve the issue for review on appeal. (*Id.* at pp. 948-949.) Plaintiff also relies on *Null* for the proposition that, ““In order to complain of failure to instruct on a particular issue the aggrieved party must request the *specific proper instruction.*’ [Citation.]” (*Null, supra*, 206 Cal.App.3d at p. 1535.) Neither *Agarwal* nor *Null* applies in this case, as we now explain.

In *Agarwal*, the issue was whether the jury was correctly instructed on an employer’s liability for punitive damages based on the acts of its employee. The Supreme Court concluded that the jury was correctly instructed on liability predicated on vicarious liability under the doctrine of respondeat superior. (*Agarwal, supra*, 25 Cal.3d at p. 949.) “It does not follow, however, that an instruction on vicarious liability must subsume the applicable law on damages. A court is not required to embody all the law that may be gleaned from the instructions read together as a whole in any one instruction [citations], nor was *Agarwal*, as the party requesting the challenged instruction, required to do so [citations]. Rather, ‘In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.’ [Citations.]” (*Agarwal*, at pp. 950-951, fn. omitted.)

The parties do not dispute that the jury instructions in this case do not include actual loss, or economic injury, as an element of any tort theory of liability plaintiff relied on at trial. Whether the jury instructions are correct statements of the pertinent law depends at least initially on whether proof of economic injury is an element of the theories of recovery in question or whether it was an element of damage. If the latter, NAC was required to propose its own instruction, or at the very least, object to plaintiff's jury instructions, in order to rely on the omission as a basis for reversing the judgment on appeal.

In arguing that “the ‘economic loss’ rule is a specialized rule of damages” rather than an element of the underlying theories of recovery, plaintiff relies entirely on his statutory claim based on financial abuse of an elder. He does not address either the fraud or negligent misrepresentation theories. We can only assume that his oversight is due to the fact that he cannot prevail on those theories because, as previously discussed, actual loss is an element of both fraud and negligent misrepresentation. Simply put, to recover on a fraud or misrepresentation claim a plaintiff must suffer and thus must prove actual monetary loss. (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1240.)

Because actual monetary loss is an element of plaintiff's fraud and misrepresentation theories of recovery, plaintiff was responsible for including that element in the jury instructions on those theories, and thus for presenting evidence on that element at trial. NAC was not required to object to the omission. NAC is “deemed to have excepted to every instruction given and [is] therefore not barred by [its] failure to

offer an alternative instruction from asserting error in the instruction as given.

[Citations.] . . . “‘To hold that it is the duty of a party to correct the errors of his adversary’s instructions . . . would be in contravention of section 647, Code of Civil Procedure, which gives an exception to instructions that are given While the exception will be of no avail where an instruction states the law correctly but is ‘deficient merely by reason of generality,’ in other cases he will not be foreclosed from claiming error and prejudice.’”” (*Agarwal, supra*, 25 Cal.3d at p. 949; see also *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 9 [“when a trial court gives a jury instruction which is prejudicially *erroneous as given*, i.e., which is an incorrect statement of law, the party harmed by that instruction need not have objected to the instruction or proposed a correct instruction of his own in order to preserve the right to complain of the erroneous instruction on appeal”].)

Plaintiff’s jury instructions on fraud and negligent misrepresentation were incorrect because they did not include actual loss as an element of either theory. Because plaintiff believed the jury instructions correctly stated the pertinent law, plaintiff did not present evidence on the issue of actual loss and his special verdict form did not ask the jury to find that he suffered actual loss, or economic injury, as a result of NAC’s conduct. NAC, in turn, raised the absence of evidence to show economic loss or injury in its motion for judgment notwithstanding the verdict. The trial court should have granted that motion with respect to the fraud and negligent misrepresentation theories of recovery and entered judgment in favor of NAC. But even if NAC had remained silent, and had not

moved for judgment in its favor in the trial court, we would be required to reverse the judgment on appeal because it was plaintiff's obligation, not NAC's, to request proper instructions on his theories of recovery.⁶

To the extent *Null* holds otherwise, we disagree with the holding. The error in *Null* stems from that court's use of the term "issue" instead of the term "theory." Contrary to the statement in *Null*, a party is not required to request instruction in the trial court on every *issue* in order to challenge an instruction on appeal. (*Null, supra*, 206 Cal.App.3d at p. 1535.) A party need only request instruction on its theory of the case. For example, in a fraud case the defendant's theory might be that the plaintiff's reliance on the allegedly fraudulent representation was not reasonable and therefore the plaintiff is not entitled to any recovery. However, it is the plaintiff's obligation to request a jury instruction that includes the issue of reasonable reliance as an element of the fraud theory of recovery, and the defendant is not required to object or point out the error if the plaintiff fails to do so. In short, if the plaintiff's instructions are incorrect, and as a result the plaintiff fails to prove an essential element of a theory relied on at trial, and the defendant raises that issue on appeal, the judgment must be reversed.⁷

⁶ Because it was plaintiff's obligation to ensure the jury was properly instructed and made the findings essential to prevail on his theories of recovery, NAC did not invite the error by submitting a special verdict form identical to the one plaintiff submitted, which did not ask the jury to make a finding on whether plaintiff suffered economic injury.

⁷ We also disagree with *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, and *Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, cited by NAC and purportedly distinguished by plaintiff to the extent those cases suggest
[footnote continued on next page]

2.

**FINANCIAL ABUSE OF AN
ELDER THEORY**

The only other theory of recovery plaintiff relied on in the trial court is that of financial abuse of an elder. Plaintiff, as noted previously, contends that the jury was properly instructed in the language of the pertinent statute and therefore this theory of recovery supports the jury's damage awards.

Plaintiff's cause of action for financial abuse of an elder is based on Welfare and Institutions Code former section 15657.5, subdivision (a),⁸ which at the time of trial and therefore as pertinent to this appeal, stated, "Where it is proven by a preponderance of the evidence that a defendant is liable for financial abuse, as defined in Section 15610.30, in addition to all other remedies otherwise provided by law, the court shall award to the plaintiff reasonable attorney's fees and costs. The term 'costs' includes, but is not limited to, reasonable fees for the services of a conservator, if any, devoted to the litigation of a claim brought under this article," including the right to recover attorney's fees in a civil action. As defined in former section 15610.30, "(a) 'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes,

[footnote continued from previous page]

a defendant is required to object to a plaintiff's incorrect jury instruction or special verdict form.

⁸ Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code, and to the provisions in effect at the time of plaintiff's trial.

secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith. [¶] (1) A person or entity shall be deemed to have acted in bad faith if the person or entity knew or should have known that the elder or dependent adult had the right to have the property transferred or made readily available to the elder or dependent adult or to his or her representative. [¶] (2) For purposes of this section, a person or entity should have known of a right specified in paragraph (1) if, on the basis of the information received by the person or entity or the person or entity's authorized third party, or both, it is obvious to a reasonable person that the elder or dependent adult has a right specified in paragraph (1). [¶] (c) For purposes of this section, 'representative' means a person or entity that is either of the following: [¶] (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult. [¶] (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney."

Former section 15610.30 defines financial abuse of an elder; it does not create a new tort or independent theory of liability under which plaintiff may recover damages.

Financial abuse of an elder,⁹ when proven, entitles a litigant to the additional, or enhanced, remedies specified in former section 15657.5, subdivision (a), quoted above, which include attorney's fees and costs. (See, e.g., *Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 529 [The Elder Abuse Act "does not create a cause of action as such, but provides for attorney fees, costs, and punitive damages under certain conditions."].) A statutory right to recover attorney's fees is in keeping with the purpose of the Elder Abuse Act, which, as the Supreme Court explained in *Delaney v. Baker* (1999) 20 Cal.4th 23, "is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Id.* at p. 33.) In accordance with that purpose, as enacted in 1982, the Legislature initially focused on "measures designed to encourage the reporting of such abuse and neglect. (§ 15601 et seq.) Subsequent amendment refined the 1982 enactment, but the focus remained on reporting abuse and using law enforcement to combat it [citation]. Also, Penal Code section 368 was enacted, making it a felony or misdemeanor (depending on the circumstances), for, among other things, a custodian of an elder or dependent adult to willfully cause or permit various types of injury. [Citation.]" (*Ibid.*) "In the 1991 amendments [pursuant to which the Legislature added section 15657] at issue here, the focus shifted to private, civil enforcement of laws against elder abuse and neglect. '[T]he Legislature declared that "infirm elderly persons and dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are

⁹ Under the statute, an elder is a person 65 years of age or older. (§ 15610.27.)

brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits.” (§ 15600, subd. (h), added by Stats. 1991, ch. 774, § 2.) It stated the legislative intent to “enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.” (*Id.*, subd. (j))’ [Citation.]” (*Delaney v. Baker, supra*, at p. 33.)

Although *Delaney v. Baker* involves physical abuse of an elder resulting from medical malpractice and concerns the application of section 15657, it nevertheless is pertinent to financial abuse of an elder under former section 15657.5 at issue in this appeal because the two statutes are identical. The Legislature enacted former section 15657.5 and amended section 15657 in 2004, among other things, to lower the burden of proof from clear and convincing evidence to preponderance of the evidence in order to recover attorney’s fees and costs in a civil action based on either physical or financial abuse of an elder. (See Sen. Com. on Public Safety, Analysis of Assem. Bill No. 2611 (2003-2004 Reg. Sess.) as amended June 16, 2004.) When enacted in 2004, the provisions of section 15657.5 mirrored those in section 15657. Thus, both sections not only included the right to recover attorney’s fees and costs (§ 15657, subd. (a); former § 15657.5, subd. (a)), but also provided that the right to recover for pain, suffering, and disfigurement survives the death of the elder, and therefore the limitation in Code of Civil Procedure section 377.34 does not apply, if the plaintiff proves financial abuse as defined in former section 15610.30, and also shows by clear and convincing evidence, that the defendant was guilty of recklessness, oppression, fraud, or malice in the commission of

that financial abuse. (§ 15657, subd. (b); former § 15657.5, subd. (b)(1).) In addition, both section 15657 and former section 15657.5 state, “The standards set forth in subdivision (b) of Section 3294 of the Civil Code regarding the imposition of punitive damages on an employer based upon the acts of an employee shall be satisfied before any damages or attorney’s fees permitted under this section may be imposed against an employer.” (§ 15657, subd. (c); former § 15657.5, subd. (b)(2).)¹⁰

In short, at the time pertinent to this appeal, former section 15657.5 created additional or enhanced remedies that are recoverable if the conduct underlying a claim for financial abuse of an elder constitutes a tort, and thus gives rise to a right to recover damages. In this case, for example, if plaintiff had suffered actual injury or financial loss and as a result had established a claim for fraud or negligent misrepresentation, then in addition to the damages recoverable for those torts, he would have been entitled to recover his attorney’s fees and costs from NAC under former section 15657.5, subdivision (a), if plaintiff established conduct within that statute and also met the standards set out in Civil Code section 3294.

¹⁰ The Legislature amended section 15657.5 in 2008, and as a result subdivision (a) now expressly authorizes the recovery of “compensatory damages” along with all other remedies otherwise provided by law when it is proven “that a defendant is liable for financial abuse, as defined in Section 15610.30.” The Legislature also added section 15657.7, which creates a four-year statute of limitations within which to bring an action for damages based on financial abuse of an elder. The amendments, which became effective January 1, 2009, do not apply retroactively. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243 [“A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so.”]; see also *Carter v. California Dept. of Veterans Affairs* (2006) 38 Cal.4th 914, 922.)

3.

ACTUAL INJURY OR DAMAGE

As an alternative claim plaintiff argues that he did suffer financial loss as a result of NAC's conduct and that loss consists of the surrender fees totaling \$3,562 that he incurred when he made two early withdrawals from the American Equity deferred annuities in order to pay his bills, and the \$40,000 in credit card debt he incurred because he did not have enough cash available to pay his bills.¹¹ There are several defects in plaintiff's assertion, the most significant of which is that plaintiff did not ask that the jury be instructed on economic loss or make a finding on economic injury. Nor can we say that a jury faced with the issue necessarily would have identified the noted expenses as losses attributable to NAC's conduct. The evidence presented in the trial court included the undisputed evidence that, at the time plaintiff purchased the NAC annuities, he had \$80,000 on deposit in a savings account at Downey Savings. Although plaintiff apparently did not remember that he had that money, and instead believed that all his money was tied up in deferred annuities, we cannot say that a jury presented with the issue would necessarily have found that the surrender fees and credit card debt are losses plaintiff incurred as a result of NAC's actions. The jury did not make such a finding in

¹¹ Plaintiff also notes that because he was so depressed a friend insisted on taking him to her doctor for an evaluation, and as a result he incurred the expense of a doctor's visit. Although plaintiff and his friend both testified that plaintiff had an appointment with the friend's doctor, plaintiff did not present any evidence at trial to establish the cost of that doctor's visit.

this case, and therefore plaintiff did not prove he suffered any actual loss or injury that would support recovery of any damages in this action.

4.

CONCLUSION

As previously noted, NAC raised plaintiff's failure to prove actual injury or financial loss as one of the grounds upon which it moved in the trial court for judgment notwithstanding the verdict. The trial court should have granted that motion. Therefore, we will reverse the judgment and direct the trial court to enter judgment in favor of NAC. (Code Civ. Proc., § 629 ["If the motion for judgment notwithstanding the verdict be denied and if a new trial be denied, the appellate court shall, when it appears that the motion for judgment notwithstanding the verdict should have been granted, order judgment to be so entered on appeal from the judgment or from the order denying the motion for judgment notwithstanding the verdict."].) Our reversal of the judgment also reverses the attorney's fees awarded to plaintiff.

Because we are reversing the judgment, the remaining issues NAC raises in its appeal, and the attorney's fees issue plaintiff raises in his cross-appeal, are moot.

DISPOSITION

The judgment in case No. E041640 is reversed and remanded to the trial court with directions to enter judgment in favor of NAC. Plaintiff's cross-appeal, case No. E045194, is moot and for that reason is dismissed.

Each party to bear its own costs on appeal.

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/s/ McKinster
Acting P.J.

I concur:

/s/ Gaut
J.

King, J., Dissenting.

Based on the trial court's failure to instruct on "economic loss," the majority reverses judgment entered in favor of plaintiff and directs the trial court to enter judgment for defendant pursuant to defendant's motion for judgment notwithstanding the verdict.

While characterizing the issue as a failure to instruct, the majority opinion is fundamentally premised on the notion that plaintiff did not prove he suffered economic injury, a prerequisite to receiving an award of damages for emotional distress. I disagree. Regardless of whether "economic injury" is an element of fraud and negligent misrepresentation, or simply a specialized rule of damage, it is patent that for a period of one and one-half years, plaintiff was out-of-pocket and suffering an "economic injury" of \$350,000. That defendant later returned plaintiff's money to him does not affect the fact that he was out-of-pocket these funds for a significant period of time.

At trial, defendant never disputed that it had plaintiff's money for one and one-half years. Because the issue was not in dispute, any failure to instruct on economic loss is harmless.

A. Plaintiff Suffered an "Economic Injury"

I do not take issue with the majority, that a plaintiff must show economic loss for purposes of recovering damages for emotional distress. I believe, however, the majority's view of what constitutes economic loss is too constrained and ignores the

rationale for the rule requiring economic loss.¹ In *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, the plaintiff sued the defendant for fraudulently terminating disability payments. In that case, the plaintiff purchased a credit disability policy to cover payments on a \$21,687 loan in case he became disabled. Shortly thereafter the plaintiff injured his back while loading a clothes dryer onto a truck. After paying benefits for 18 months, the carrier stopped making payments. Two months later an adjusting company for the carrier advised the plaintiff that the benefits had been terminated in error and payments began anew. Defendant Equifax, a company involved in investigating insurance claims on behalf of insurance companies, was then contacted to set up a medical exam for the plaintiff. At the request of Equifax, the plaintiff was sent to a physician for an exam. Equifax did not send medical records to the doctor and provided the doctor with an erroneous definition of “total disability” under the terms of the policy. Following the exam, the plaintiff was deemed not totally disabled and benefits were again discontinued. Ten months later, benefits were reinstated. The issue before the court was whether the plaintiff was entitled to damages for emotional distress after benefits were reinstated for the last time. In explaining the need for economic injury as an underpinning for the recovery of emotional distress damages on a fraud claim, the court stated: “[D]amages for mental distress have . . . been awarded in cases where the tortious conduct was an interference with property rights without any personal injuries apart from

¹ As evident from the majority’s discussion, “economic loss” is pigeonholed to expenditures such as doctor’s bills and/or late fees or interest payments on credit card debts.

the mental distress. . . . *The principal reason for limiting recovery of damages for mental distress* is that to permit recovery of such damages would open the door to fictitious claims, to recovery for mere bad manners Obviously, where, as here, the claim is actionable and has resulted in *substantial damages* apart from those due to mental distress, *the danger of fictitious claims is reduced*, and we are not here concerned with mere bad manners or trivialities but tortious conduct resulting in substantial invasions of clearly protected interests.” (*Id.* at p. 1030, fn. omitted.) “An award of damages for emotional distress resulting from tortious termination of disability benefits is not limited as a matter of law to the time during which the economic harm continues totally unabated. Those cases which have allowed emotional distress as an element of damages resulting from tortious breach of insurance contracts have required economic harm only to ensure, as a threshold matter, that an actual wrong has been committed against plaintiff.” (*Ibid.*)

It is this same rationale that requires some economic injury prior to the award of emotional distress damages in insurance bad faith actions. (See *Gourley v. State Farm Mut. Auto. Ins. Co.* (1991) 53 Cal.3d 121, 126-129; *Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1215 [““[B]reach of the implied covenant of good faith is actionable because such conduct causes financial loss to the insured, and *it is the financial loss or risk of financial loss* which defines the cause of action. Mental distress is compensable *as an aggravation of the financial damages, not as a separate cause of action.*””].)

Here, defendant's tortious conduct was a significant interference with plaintiff's property rights in the \$350,000. We are not dealing with bad manners or a triviality on the part of defendant. There was a substantial invasion by defendant with plaintiff's ability to use a large amount of money; this one and one-half year interference with plaintiff's ability to access his funds belies the fictitiousness of plaintiff's claim for emotional distress and clearly satisfies the underlying rationale of requiring an economic loss.

Contained in defendant's appellate briefing is the notion that plaintiff did not sustain economic injury because defendant eventually, after numerous demands from plaintiff, returned his money to him with a little bit extra to boot; thus he had no economic loss. Defendant also argues that while it had plaintiff's money, it was invested in an annuity in plaintiff's name, thus no economic loss. These arguments miss the point.

Here the jury found that defendant tortiously obtained \$350,000 of plaintiff's money by fraudulently selling him an annuity. Whether the funds were obtained by fraud or simple conversion is of no moment; the conduct was found to be tortious. The evidence, without contradiction, showed that plaintiff did not have this money for a period of one and one-half years. During this time frame, he had no access to the funds unless he wished to pay a withdrawal penalty of \$77,000. He was simply deprived of his money. This is an economic loss. The fact that the funds were invested in an annuity in plaintiff's name equally does not mean that he did not suffer an economic loss. Prior to the purchase of the annuity, his funds were in Charles Schwab and were easily accessed

by him. He was 82 years old; in that a withdrawal of all the funds without penalty could not be done for 15 years, and given his life expectancy, the money would, in essence, remain unavailable for the remainder of his life. He was simply deprived of his \$350,000 for one and one-half years and was at risk of being without the money for another 13 and one-half years.

And while defendant returned the funds only after numerous demands and after the filing of a lawsuit by plaintiff, it nonetheless does not mean that plaintiff suffered no economic loss. Plaintiff parted with \$350,000. He was entitled to recover from defendant \$350,000 in economic damages. To the extent defendant repaid all of the \$350,000 after plaintiff filed his lawsuit does not exonerate defendant from liability for its original tort; the repayment simply means that defendant would be entitled to a credit at the time of judgment. (See *Southern Pacific Co. v. Edmunds* (1914) 168 Cal. 415.) Delayed repayment during litigation does not equate to no economic loss.

B. The Failure to Instruct on the Issue of Economic Loss Is Harmless

“A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ (Cal. Const., art. VI, § 13.) . . . [¶] Instructional error in a civil case is prejudicial ‘where it seems probable’ that the error ‘prejudicially affected the verdict.’ [Citations.] . . . [T]hat determination depends heavily on the particular nature of the error, including its natural and probable effect on a party’s ability to place his full case before the jury.” (*Soule v.*

General Motors Corp. (1994) 8 Cal.4th 548, 580.) In evaluating the effect of the error, the court looks to the whole record, including “the state of the evidence” and counsels’ arguments. (*Id.* at pp. 580-581.)

In the present case, it is clear that the failure to instruct on economic loss had no effect on this jury verdict. At no point during the proceeding did defense counsel ever dispute that defendant received \$350,000 from plaintiff and possessed it for one and one-half years; the sole issue was whether the funds were obtained as a result of fraud. “In the absence of any factual issue regarding [the omitted jury instruction], there is no basis upon which to conclude that the jury’s verdict was in any way affected by the alleged instructional error.” (*People v. Richardson* (2008) 43 Cal.4th 959, 1026.)

While I agree that the jury should have been instructed on economic loss, under our facts, the failure to do so is harmless, because the fact of a \$350,000 economic loss for one and one-half years was patent, and said fact was never disputed by defendant.

/s/ King
J.